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No. 88-1338

IN THE
Supreme Court of the United States
October Term, 1988

WILLIAM C. POLLARD,
Cross-Petitioner,

v.

MARTIN MARIETTA CORPORATION,
Cross-Respondent.

REPLY BRIEF IN SUPPORT OF CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF AUTHORITIES

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Pollard's Cross-Petition in the instant case seeks relief from the judgment below on the grounds that the Court of Appeals erroneously applied the work product doctrine to deny a defendant in a criminal trial access to evidence that court had determined to be relevant, admissible and specifically designated, as defined by Fed. R. Crim. P. 17(c) and controlling precedents thereunder. The Cross Petition rests upon questions of law as to whether the work product doctrine should be applied in this manner in light of: (1) the Sixth Amendment compulsory process clause; (2) Fed. R. Evid. 501; (3) the doctrinal basis of the work product doctrine itself; and (4) the "good cause" exception to the work product doctrine.

In Case No. 88-1157, Martin Marietta Corporation urges this Court to grant Certiorari to consider its arguments that the District Court and the Court of Appeals went too far in

applying the waiver doctrine applicable to Attorney Client privilege and limited work product protection. Although Martin Marietta opposes the grant of the Cross-Petition, it offers little argument on the merits to show that the questions raised in the Cross-Petition are unimportant or insubstantial. Instead, it claims that the arguments raised in the Cross-Petition should not be considered by this Court because they were not presented in the brief to the Court of Appeals and that the issue of waiver should be determined in the absence of any consideration of whether the documents in question are privileged or protected from disclosure in the first instance.

Although the Court of Appeals reversed Martin Marietta's contempt citation on the basis of a distinction between "pure opinion" work product and work product involving matters of fact, the Company's opening brief to the Court of Appeals did not raise any such distinction. [1] The Court of Appeals decision shows that the portion of the judgment below from which Pollard seeks relief is based upon matters *which Martin Marietta first raised in oral argument and not in its briefs below.* (Pet. App. 12a-13a).

The District Court's order required all of the documents at issue to be made available to Pollard for use in his defense at his trial on the grounds of waiver, and Pollard had no reason at the time of his initial brief to make any issue of what then appeared to be an academic point: whether the District Court erroneously classified as privileged or protected some of the documents which it held to be subject to disclosure in either event. [2]

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[1] Pollard has requested that a copy of Martin Marietta's brief in the Court of Appeals be transmitted to this Court pursuant to this Court's Rule 19.

[2] The ultimate issue before the Court of Appeals was the reversal or affirmance of Martin Marietta's contempt citation. The Court of Appeals could not have affirmed the contempt citation on the theory

Because Martin Marietta has failed to comply with the District Court order below, Pollard has not seen *any* of these documents, and he could hardly be expected to anticipate when he filed the Court of Appeals brief referred to by Martin Marietta that the Company would later contend in oral argument that some of the documents at issue involved matters of pure opinion only and that the Court of Appeals would hold that the work product doctrine applied to these documents but that any attorney client privilege had been waived. Without access to the materials at issue, Pollard argued for affirmance of the District Court on the basis of waiver principles applicable to both the attorney client privilege and the limited protection afforded work product materials.

For this Court to avoid the issues raised in the Cross-Petition would only cause the Court's opinion to become confusing and misleading. Martin Marietta has no basis to argue that the waiver issue can be decided independently of the question of whether the materials at issue were privileged or protected from disclosure in the first instance. If Martin Marietta prevails on the merits of its Petition and this Court holds that the Court of Appeals went too far in applying the waiver doctrine to work product materials, lower courts and litigants in other cases will assume that in circumstances similar to the case at bar a work product privilege is available, even to the extent that it cuts off a defendant's access in a criminal trial to materials that are otherwise available under Fed. R. Crim. P. 17(c). As Martin Marietta's arguments make clear, litigants are prone to read into the Court's decisions matters

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that Martin Marietta should have produced part of the materials required to be disclosed by the District Court. *Bowman Dairy Co. v. United States*, 341 U.S. 214, 221 (1951). Until Martin Marietta made its representations to the Court of Appeals later on that some of the materials involved "pure opinion" work product, any argument by Pollard addressed to the work product protection which did not also dispose of attorney client privilege would have been ineffective for the purpose of affirming the District Court judgment.

which they contend *should* have been decided, even if they were not. Thus, Martin Marietta cites: *Hickman v. Taylor,* 329 U.S. 495 (1947), for the proposition that work product protection was recognized as an evidentiary privilege within the meaning of Fed. R. Evid. 501 (Opposing Brief at 7) even though the Court stated that such materials were *not* privileged (329 U.S. at 509-510 & n. 9); and *United States v. Nobles,* 422 U.S. 225 (1975), for the proposition that a work product privilege applies at trial, even though the opinion of the Court expressly left the application of the work product doctrine at trial to another day and held simply that any privilege "as may have existed" had been waived (422 U.S. at 239). [3]/

To the extent that Martin Marietta urges reversal on the basis of the limited work product protection, Pollard has every right to urge any matter to support the judgment below, including the absence of any lawful privilege in the first instance, even without any Cross-Petition. *Dayton Board of Education v. Brinkman,* 433 U.S. 406, 419 (1974). [4]/ To the

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[3]/ Pollard does not contend that the work product doctrine lacks any application at trial. He has never claimed the right even as a defendant in a criminal case to litigate on wits borrowed from his adversary or that he should obtain discovery for the purpose of assuring himself that he has overlooked nothing. The point is that the documents at issue are independently relevant as transactions ultimately at issue in the criminal proceeding. (See Cross Petition at 17).

[4]/ In only two of the cases cited by Martin Marietta's brief in opposition to the Cross Petition did the Court criticize a respondent for not raising issues in the Courts below. In *Jenkins v. Anderson,* 447 U.S. 231, 234 n. 1 (1980), the Court took pains to point out that Respondent's arguments involved issues of state law which are more appropriately addressed to lower courts more familiar with it; here, the questions under the Sixth Amendment, Rule 501 and the Work Product Doctrine are matters of general applicability throughout the Federal system. Moreover, since the Respondent ultimately won the case on the merits, the Court's avoidance of state law issues was hardly prejudicial. In *Federal Trade Commission v. Grolier, Inc.,* 462 U.S. 19, 23 n. 6 (1983), respondents attempted to raise for the first time in this Court a totally factual matter that appeared to have little, if any, general applicability.

extent Martin Marietta opposes the Cross-Petition for the purpose of narrowing issues involved in the instant proceedings, the Court's action on the Cross-Petition would not bring about the desired end, since Pollard must raise these issues anyway in response to Martin Marietta's Petition. Such action would simply make it impossible for Pollard to secure relief from the judgment below if the Court ultimately determines that he is right.

Consideration of the Cross-Petition issues will give the Court more options to dispose of the case in an efficient but just manner. In the unlikely event that the Court does not feel equipped to dispose of the Cross-Petition issues after briefing is completed, those issues might be remanded. Just such an approach was taken in *Youkakim v. Miller,* 425 U.S. 234 (1976). In that case the remand to the Court of Appeals was the only action taken by the Court. On the other hand, the Court might also opt for deciding work product issues on the grounds that the limited work product protection cannot be afforded in the circumstances of this case because of the issues raised in the Cross- Petition.

As shown in the Cross-Petition filed in Case No. 88-1338, and Pollard Memorandum in Opposition to Martin Marietta's Original Petition filed in 88-1157, the issues of waiver are inextricably involved with the factual context of this case. On the other hand, the issues raised in the Cross-Petition involve only questions of law which are generally applicable whenever a work product claim is made to withhold evidence from a defendant in a criminal case after that defendant makes a showing under Rule 17(c) that the material is needed for evidentiary purposes at trial. Since the Court of Appeals and the District Court have resolved the Rule 17(c) issue, the

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Here, Pollard is contesting the legal sufficiency of the underlying work product claim as a basis to deny him access to trial evidence where Rule 17(c) findings of admissibility, relevance and specificity were made below.

Court now will be able to focus directly upon the implications of the Rule 17(c) findings upon the legal sufficiency of the claim to work product protection.

Because the factual basis for the Cross-Petition need reach no further than the findings made below, the sparseness of the record below is no reason to deny it if the court were to grant Martin Marietta's Petition. As shown by both the Cross-Petition and Pollard's memorandum in opposition to the original petition, Martin Marietta has not been very consistent on factual matters which are vital to establishing its privilege and work product claims in the first instance. Pollard has not had the same opportunity to develop the record because he has never been given access to the materials. While the sparseness of the record constitutes grounds to decline the case as a whole and to await a more appropriate case to decide the waiver issues, it hardly constitutes grounds to prejudge issues of law raised in the Cross-Petition that may be dispositive of the case and avoid the necessity of delving into its factual intricacies.

CONCLUSION

In the event that the Court grants certiorari in Case No. 88-1157, it should also grant the Cross-Petition in the instant case.

Respectfully submitted,

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